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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICK MALONE,

Defendant and Appellant.

A154471

(Alameda County
Super. Ct. No. 16CR014963)

Following a jury trial, defendant Vick Malone was convicted of (1) murder in the first degree (Pen. Code, § 187, subd. (a)¹), together with true findings that he personally used and discharged a firearm causing death (§§ 12022.5; 12022.53, subd. (c)), and (2) attempted murder (§§ 187, subd. (a), 664)), together with a true finding that he personally used a firearm (§ 12022.5, subd. (a)). He was sentenced to an aggregate term of 57 years to life, consisting of 7 years for the attempted murder conviction and 50 years to life for the murder conviction and one related firearm use enhancement under section 12022.53, subdivision (d). The court struck the firearm use enhancement related to the attempted murder conviction.

Defendant's sole substantive contention on appeal is that the trial court failed to properly instruct the jury on the concept of self-defense. We find that this claim of instructional error does not warrant reversal. However, we agree with the parties that the

¹ All further unspecified statutory references are to the Penal Code.

court's sentencing minute order and abstract of judgment concerning the determinate sentence imposed on the attempted murder conviction and related firearm use enhancement should be amended to correct certain clerical errors. Accordingly, we remand for the correction of the sentencing minute order and abstract of judgment on the determinate sentence. In all other respects, we affirm.

FACTS

The charges against defendant arose from an incident that occurred between defendant and the murder victim E.M.² (hereinafter referred to as the victim) and the victim's uncle T.W.³ (hereinafter referred to as the victim's uncle), who was the attempted murder victim.

The initial confrontation between defendant and the two men is essentially undisputed. On the day of the incident, the murder victim and his uncle were next door, at the home of the victim's girlfriend. While the victim was inside his girlfriend's house, his uncle went outside and approached defendant, who was standing in the middle of his front yard. Defendant and the victim's uncle, later joined by the victim's girlfriend, had an agitated conversation about defendant throwing his yard clippings on the victim's car when it was parked in the driveway adjacent to defendant's front yard. When defendant called the victim a derogatory name, the victim came "flying out the door" of his girlfriend's house. The victim approached defendant and the men exchanged "fighting words." As the two men approached each other, they pulled out knives. According to the People's witnesses, defendant was the first man to pull out a knife, while defendant testified the victim was the first man to pull out a knife. Defendant backed up and threw his knife at the victim. The knife bounced off the victim's torso and fell to the ground. The victim then picked up defendant's knife and ran towards defendant. Defendant

² Pursuant to the California Rules of Court rule 8.90(b)(4), governing "Privacy in Opinions," we refer to the victims by their initials.

³ *Ante*, fn. 2.

backed up, then slipped and fell to the ground near the front steps leading to his house porch. While defendant was on the ground, the victim stomped on him several times and then started to punch him. According to defendant, the victim put a knife to his throat and threatened to kill him, and defendant then lost consciousness. The victim's uncle ultimately grabbed the victim, and they went back to the victim's girlfriend's house and sat on the front stairs leading to the porch. When defendant regained consciousness, he stood up and went inside his house. What happened next was disputed by the parties and was the crux of the charges filed against defendant.

According to the People, approximately five minutes after defendant had entered his house, he came back outside with a loaded shotgun. From his front lawn, he aimed his shotgun at the unarmed victim and discharged the gun once or twice. Just before defendant fired his gun, the victim got up and tried to flee into his girlfriend's house. The victim managed to reach the front porch of the house before he collapsed and died. Defendant then pointed the gun at the victim's uncle, "racked the shotgun," pulled the trigger, and the gun "clicked" but it did not fire. Defendant looked at the gun, appeared surprised, and again pointed it at the victim's uncle and attempted to shoot but the gun again jammed. Defendant then ran back inside his house. The victim's uncle admitted he fled the scene after the shooting but he denied taking any gun from the victim's hand. The victim's uncle also denied giving the victim a gun earlier that day.

The People's ballistics expert test fired defendant's shotgun with two loaded cartridges. He testified that the gun fired the first cartridge and ejected the spent cartridge, but when he tried to fire the second cartridge there was an audible click but the gun did not fire. The expert opined the shotgun's recoil adapter had not been well maintained, and explained that the gun fired properly once it had been taken apart and reassembled.

According to defendant, after the initial altercation he went inside his house and could hear the victim and his uncle talking outside. Defendant looked out a window and

saw the victim's uncle hand the victim a black revolver. Defendant continued to look out his window and he saw the victim holding the revolver and moving towards the front of defendant's house. Defendant's front door was open and he felt he did not have enough time to call the police. Defendant grabbed his shotgun and "chambered" a round, readying the gun to fire; he also grabbed two additional rounds. Defendant exited his house, walked down the front stairs, and stood at the bottom of the stairs. Defendant saw the victim backing up towards the front of the victim's car, which was still parked in the driveway of the girlfriend's house. Defendant walked onto his lawn to get a clearer view of the victim. The victim continued to back away, walking up the front steps of his girlfriend's house, but holding his gun pointed at defendant's torso. Defendant moved right, using the victim's car hood for cover, bent down and fired his shotgun at the victim. Defendant aimed at the victim and fired to "protect" his life. At the time of the shooting, defendant was remembering that his father had died in a shooting and defendant did not want to die in the same way. Defendant discharged his gun to "stop" the victim, not to kill him. The shotgun pellets struck the victim's ear and the side of his head. Defendant did not know if the victim ever fired his gun.

After defendant fired his shotgun, he heard the victim's uncle "cussing" and "moving." Defendant turned to see if the victim's uncle had a gun or any other object in his hands. Because the victim's uncle did not have anything in his hands, defendant did not attempt to fire his gun. Also, at that point there was no more ammunition in defendant's shotgun as defendant had only loaded one round. Defendant then went back to his house, called 911, and then returned to his front lawn and picked up the one expended shotgun shell.

During the 911 call, defendant explained that he had shot somebody because "he came over, pulled a knife on me, kicked me in my face, and put me down on the ground. I come back outside, he was running at me." Defendant further stated the victim had "charged me all down on the ground, tried to jump on me." When asked if he had an

argument with the victim, defendant said, “No. I was doing my yardwork, he came outside, some guy came out the backyard talking stuff about some trimmings on his car. And then he came out, the one that jumped on me.” In response to the 911 operator’s repeated questions asking what happened after defendant had retrieved the gun from his house and returned outside, defendant first said that “[t]he guy was still outside threatening me. Talking shit. And then he ran;” and defendant later said, “he was staying outside of the house, arguing with me, kicked me, and tried to stick me with the goddamn knife until somebody pulled him off of me. The police are about here now, let me go.” At no time did defendant tell the 911 operator that the victim had a gun.

DISCUSSION

I. Self-Defense Instructions

A. Relevant Facts

Before the jury instruction conference, the prosecutor requested, in pertinent part, that the court advise the jury of the law using CALCRIM Nos. 571 [Voluntary Manslaughter: Imperfect Self-Defense], 3471 [Right to Self-Defense: Mutual Combat or Initial Aggressor], 3472 [Right to Self-Defense: May Not Be Contrived]; 3474 [Danger No Longer Exists or Attacker Disabled]. The prosecutor also asked the court, in pertinent part, to modify CALCRIM No. 505 [Justifiable Homicide: Self-Defense or Defense of Others] by adding a pinpoint instruction on the definition of “imminent danger.”

During the jury instruction conference, the court informed counsel it had prepared some preliminary instructions and some instructions based on the evidence admitted at the conclusion of the trial. The court refused the prosecutor’s request to modify CALCRIM No. 505 with the addition of a pinpoint instruction on the definition of imminent danger because that definition was “built into the instruction.” Neither party objected to the trial court’s proposed use of CALCRIM Nos. 3471, 3472, or 3474.

Thereafter, the court advised the jury concerning the concepts of murder in the first degree (intention killing with premeditation, deliberation, express malice

aforethought), murder in the second degree (intention killing without premeditation and deliberation, express or implied malice aforethought), and voluntary manslaughter under the theories of imperfect self-defense and heat of passion/sudden quarrel. (CALCRIM Nos. 520, 521, 571.) In pertinent part, the court gave the following instructions explaining the concepts of perfect and imperfect self defense:

CALCRIM No. 505. Justifiable Homicide: Self-Defense or Defense of Another

“The defendant is not guilty of murder if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury. [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger. [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant’s belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. [¶] When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. [¶] If you find that [the victim] threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past is justified in acting more quickly and taking greater self-defense measures against that person. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder.”

CALCRIM No. 3471. Right to Self-Defense: Mutual Combat or Initial Aggressor

“A person who engages in mutual combat has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting. [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] A fight is mutual combat

when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose.”

CALCRIM No. 3474. Danger No Longer Exists or Attacker Disabled

“The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws, then the right to use force ends.”

CALCRIM No. 571. Voluntary Manslaughter: Imperfect Self-Defense – Lesser Included Offense (Pen. Code, § 192)

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant’s belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant’s beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] A danger is imminent if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future. [¶] If you find that [the victim] threatened or harmed the defendant in the past, you may consider that information in evaluating the defendant’s beliefs. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.”

B. Analysis

Defendant contends the trial court committed prejudicial error in the self-defense instructions in several respects: (1) by failing to instruct the jury, as part of CALCRIM No. 505, that the defendant was not required to retreat before using deadly force in self-defense; (2) by failing to instruct the jury, using CALCRIM No. 506, that defendant had a right to use deadly force to defend himself against the victim’s threat of deadly force to

harm him in his house or on his property; and (3) by advising the jury on the concepts of mutual combat or initial aggressor in CALCRIM No. 3471, because there was no substantial evidence supporting that instruction, or, alternatively, by failing to instruct the jury, as part of CALCRIM No. 3471, that if the defendant used only non-deadly force, and the victim responded with such sudden and deadly force that defendant could not withdraw from the fight, then defendant had the right to defend himself with deadly force. Defendant also contends reversal of the attempted murder conviction is warranted because, if the jury had determined he was lawfully acting in self-defense when he shot the victim, it is reasonably probable that the jury would have either acquitted or returned a lesser included verdict of attempted voluntary manslaughter based on the provocation and threats to defendant's life.

Assuming defendant's claims are properly before us, that the trial court committed the alleged instructional errors, and that the standard of review is the test articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, we conclude that any instructional errors were harmless beyond a reasonable doubt and do not warrant reversal of either conviction. Therefore, we do not address the parties' arguments regarding defendant's failure to object to the self-defense instructions on the grounds asserted on appeal, the correctness of defendant's claims of instructional errors, or our standard of review.

Defendant contends that, as part of our harmless error analysis concerning the prejudice caused by the purported instructional errors, we must consider the evidence in the light most favorable to him. Specifically, we are to assume the jury believed his testimony that the victim had a gun, the victim pointed the gun at defendant's torso, and defendant shot the victim in self-defense. However, *under the instructions which were given*, and based on the prosecutor's closing remarks addressing defendant's testimony, if the jurors believed defendant's testimony they were required to either acquit him or find him guilty of a lesser type of homicide. If the jury believed defendant, they could not have found him guilty of murder of the first degree. (CALCRIM Nos. 505, 521, 571.) By their verdict of first-degree murder, however, the jury necessarily determined the People had demonstrated beyond a reasonable doubt that defendant did not shoot the victim

based on an either reasonable or unreasonable belief that he was in imminent danger of being killed or suffering great bodily injury, or that the immediate use of deadly force was necessary to defend against the danger posed by the victim.

Accordingly, an examination of the given jury instructions, and the prosecutor's closing remarks in their entirety, shows no "reasonable probability—that is, a reasonable chance and not merely an abstract possibility—that [defendant] would have obtained a more favorable result" (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1051) if the self-defense instructions had included the additional advisements that defendant had no duty to retreat but could use deadly force to defend against the victim's use of deadly force and defendant had a right to defend his home and property against the victim's use of deadly force or the instructions on the concepts of mutual combat and initial aggressor had been either eliminated or modified to advise the jury that if defendant used only non-deadly force, and the victim responded with such sudden and deadly force that defendant could not withdraw from the fight, then defendant had the right to defend himself with deadly force.

In sum, we conclude the given instructions on the substantive crimes and perfect and imperfect self-defense were sufficient to ensure that the jury was "allowed to 'consider the *full range* of possible verdicts-not limited by the strategy, ignorance, or mistakes of the parties,' so as to '*ensure* that the verdict [was] no harsher or more lenient than the evidence merit[ed].'" (*People v. Breverman* (1998) 19 Cal.4th 142, 160, abrogated on another ground by amendment of § 189.) Accordingly, defendant's claim of prejudicial instructional error fails.

II. Sentencing Issues

We agree with the parties that the court's sentencing minute order and the abstract of judgment for the determinate sentence imposed on the attempted murder conviction and the firearm enhancement associated with that conviction should be amended to correct certain clerical errors.

The parties appropriately note, and we concur, that the sentencing minute order and the abstract of judgment incorrectly reflect "Penal Code Section 192(a)" as the

statutory authority supporting the attempted murder conviction. The correct statutory authority for the attempted murder conviction is Penal Code Sections 187, subdivision (a), and 664.

The parties also appropriately note, and we concur, that the sentencing minute order and the abstract of judgment incorrectly reflect “Penal Code Section 12022.53(d)” as the statutory authority for the firearm use enhancement associated with the attempted murder conviction. The correct statutory authority supporting that firearm use enhancement is Penal Code 12022.53, subdivision (b). Defendant further correctly notes that the court did not impose a term of imprisonment on the firearm use enhancement, but ordered the enhancement stricken, pursuant to section 12022.53(h),⁴ for reasons stated on the record. At oral argument, both parties agreed that the sentencing minute order and abstract of judgment should be amended to correctly reflect the court’s oral pronouncement striking the enhancement.

Accordingly, on remand we shall direct the trial court to correct its sentencing minute order and issue an amended abstract of judgment to reflect that (1) Penal Code sections 187, subdivision (a), and 664 are the statutory authority supporting the attempted murder conviction; (2) Penal Code section 12022.53, subdivision (b), is the statutory authority supporting the firearm use enhancement associated with the attempted murder conviction; and (3) the firearm use enhancement (associated with the attempted murder conviction) is stricken under Penal Code section 12022.53, subdivision (h), for reasons stated on the record. (See *In re Candelario* (1970) 3 Cal.3d 702, 705 [an appellate court may correct clerical errors at any time so as to make the records reflect the true facts on its own motion or on the application of the parties]; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385–386 [“[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral

⁴ Section 12022.53, subdivision (h), reads, in pertinent part: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.”

pronouncement controls” and should be accurately reflected in the sentencing minute order and abstract of judgment].)

DISPOSITION

The matter is remanded to the trial court to correct its sentencing minute order of May 11, 2018, to reflect that (1) Penal Code sections 187, subdivision (a), and 664 are the statutory authority supporting the attempted murder conviction; (2) Penal Code section 12022.53, subdivision (b), is the statutory authority supporting the firearm use enhancement associated with the attempted murder conviction; and (3) the firearm use enhancement (associated with the attempted murder conviction) is stricken under Penal Code section 12022.53, subdivision (h), for reasons stated on the record. The trial court is directed to prepare an amended abstract of judgment for the determinate sentence in accordance with this disposition and deliver certified copies of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Wiseman, J.*

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* Retired Associate Judge of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.